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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 952

GREAT LAKES COCA-COLA BOTTLING COMPANY,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
SUPPORTING BRIEF.**

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

A STATEMENT OF THE MATTER INVOLVED.

To the Honorable, the Supreme Court of the United States:

(The opinion of the Circuit Court of Appeals for the Seventh Circuit, of March 6, 1943, is not yet officially reported, but is found in R, pp. 39-43.)

This controversy involves the proper determination of whether or not petitioner is liable for a Federal Undis-

tributed Profits Surtax for the year 1937 in the sum of \$33,303.00 and interest.

The uncontroverted facts as found by the United States Board of Tax Appeals, (now the Tax Court) and by the United States Circuit Court of Appeals for the Seventh Circuit, are as follows:

On November 30, 1937, petitioner, a Delaware Corporation, with principal offices in Chicago, Illinois, in pursuance of a plan of reorganization, transferred all of its assets, including its earnings for the period January 1, 1937, to November 30, 1937, to a number of newly incorporated companies, organized in Michigan, Ohio, and Nevada, hereinafter referred to as the new corporations, in exchange for the new corporations' stock.

Petitioner then distributed this stock, in complete liquidation, to its stockholders, in exchange for their stock in petitioner, and was dissolved in December, 1937.

Under the provisions of Sec. 112 (b), (4), (3), of the 1936 Revenue Act, 49 Stat., 1648; 26 U. S. C. A., Int. Rev. Acts, 1940 ed., p. 855, these transactions constituted non-taxable reorganizations, and no gain or loss was recognized thereon.

As of January 1, 1937, petitioner had a deficit of \$36,988.00, and petitioner's adjusted net income, as defined by Sec. 14 of the 1936 Act, for the taxable year 1937, was \$195,262.00. (R, 17, 18, 39, 40.)

The pertinent provisions of the Federal Statutes and Treasury Regulations in 1936 were as follows:

Sec. 14 of the Revenue Act of 1936, 49 Stat., 1648; 26 U. S. C. A., 1940 ed., p. 283, imposed a tax upon undistributed net income, defining "Undistributed net income" as "Adjusted net income", minus the sum of the dividends paid credit, provided in Sec. 27, and the credit provided in Sec. 26 (c), relating to contracts restricting dividends.

Sec. 27 (a) provided that:

"For the purpose of this Title, the dividends paid credit, shall be the amount of dividends paid during the taxable year."

Sec. 27 (f) provided that:

"In the case of amounts distributed in liquidation, the part of such distribution, which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall for the purpose of computing the dividends paid credit, under this Section, be treated, as a taxable dividend paid."

Section 27 (h) provided that:

"If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the stockholders, as are subject to taxation under this Title, for the period, in which the distribution is made, no dividends paid credit shall be allowed with respect to such part."

Section 115 (h) provided that:

"The distribution (whether before January 1, 1936, or on or after said date) to a distributee by or on be-

half of a corporation, of its stock or securities, or stock or securities of another corporation, shall not be considered a distribution of earnings or profits of any corporation:

- (1) If no gain to such distributee from the receipt of such stock or securities was recognized by law
* * *."

Treasury Regulations, 94, Art. 27 (f), declared that a corporation making a liquidating distribution of earnings accumulated since February 28, 1913, must be denied the dividends credit, in respect of such distribution, unless the amount distributed, be taxable in the same year, to the distributee; and further provided that if the distributee in that year makes a distribution which entitles it to a dividends paid credit, it may allocate a proper proportion thereof, to the distributor of the liquidating dividend.

Now,—the sole issue before you is whether petitioner is, under the provisions of 27 (f) entitled to a dividends paid credit, in the full amount of its 1937 adjusted net income, distributed to its stockholders, at the time of its complete liquidation on November 30, 1937, such distribution having been made to petitioner's stockholders, in the stock of the new corporations, and in exchange for their stock in petitioner's corporation.

Other issues originally involved in the petition to the Board of Tax Appeals were: (a) petitioner's right to a dividends paid credit carry over of \$136,262.38 under the provisions of subsection (b) of Section 27 of the 1936 Act, which subsection allows in the computation of dividends paid credits, for the taxable year, a carry over of the divi-

dends paid in the preceding taxable year, in excess of adjusted net income for such year. This issue arose because of the fact that in 1936 petitioner had increased its capital surplus through the sale of additional common stock, at a premium, and from the proceeds of such sale petitioner retired its preferred stock issues and paid the accumulated dividends thereon, in a sum largely in excess of its 1936 adjusted net income, and while such excess was paid from subscribed capital surplus, petitioner believed it was at least equitably entitled to a carry over of such excess and a credit thereof against its 1937 adjusted net income, and in making its 1937 return petitioner took such credit, with the result that it paid an undistributed profits tax of \$6,923.40.

At that time petitioner did not realize, as it now contends, that it was, by virtue of its distribution in 1937 of all of its assets in liquidation, entitled to a dividends paid credit in the sum of its entire earnings or profits of that year, and therefore owed no undistributed profits tax whatever.

However, in presenting its case to the Board of Tax Appeals, petitioner abandoned all claim to such dividends paid credit carry over, but should this Court find that petitioner owes no 1937 undistributed profits tax, because of the provisions of Sec. 27 (f), then petitioner will be of course entitled to a refund of \$6,923.40, paid by it in error at the time of making its 1937 return.

(b) Furthermore, in its proceedings before the Board of Tax Appeals, petitioner also claimed in the alternative

a credit in the sum of its 1937 deficit, under the provisions of Sec. 26 (c) (1), 49 Stat., 1648; U. S. C. A., Int. Rev. Acts, 1940 ed., p. 836, because under the laws of Delaware (the State of petitioner's incorporation), petitioner was prohibited from distributing dividends in the face of such deficit. This claim was likewise abandoned by petitioner, upon the rendition of the decisions of this Court in *Helvering vs. Northwest Steel Rolling Mills, Inc.*, 311 U. S. 46, and *Crane-Johnson Co. vs. Helvering*, 311 U. S. 54.

This question is, however, again an issue, because of the amendment of Sections 14 and 26 of the 1936 Act by Title 5, Section 501, of the 1942 Act, relieving those companies which have been denied the credit allowed by Section 26 (c) of the 1936 Act, where they had been prohibited by law or by order of a public regulatory body, from paying dividends, during the existence of a deficit.

The Court below in the instant case, in affirming the decision of the Board of Tax Appeals, holding petitioner not entitled to a dividends paid credit under Section 27 (f), remanded this case to the Tax Court for the proper determination of whether petitioner is entitled to any relief under the Act of 1936 as so amended.

On motion of petitioner the Court below has stayed its mandate for thirty days, or until such time as this Court acts upon this application for a writ.

JURISDICTION OF THIS COURT TO REVIEW.

A review of the Judgment of the Circuit Court of Appeals is sought by this petitioner for Certiorari under sub-

section (a) of Sec. 347, Title 28, U. S. C. A., which provides that:

"In any case, civil or criminal, in a Circuit Court of Appeals, * * *,—it shall be competent for the Supreme Court of the United States upon petition of any party thereto, * * *, to require by certiorari, either before or after a judgment or decree, by such lower Court, that the case be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The judgment of the Circuit Court was entered March 6, 1943, (R, 39) and the three months' period provided for in Sec. 350, Title 28, U. S. C. A., for the filing of this petition for certiorari will not expire until June 6, 1943, prior to which date this petition will be filed with the Clerk of this Court.

QUESTIONS PRESENTED.

The questions presented in this petition for certiorari are whether the United States Circuit Court of Appeals for the Seventh Circuit, in its opinion in this case, (R, 39-43) has correctly interpreted or construed and applied Paragraphs 27 (f), and 27 (h), of the 1936 Revenue Act, 49 Stat., 1648; 26 U. S. C. A., Int. Rev. Acts, 1940 ed., p. 838, and whether such interpretation or construction and application are not in conflict with the decisions of the United States Circuit Court of Appeals for the Second

Circuit, in *Commissioner vs. Kay Mfg. Co.*, 122 Fed., (2d), 443; and with the decision of the Fourth Circuit in *Helvering vs. Credit Alliance Corp.*, 122 Fed. (2d), 361; and with the decision of this Court affirming the *Credit Alliance Corporation Decision*, 316 U. S. 107; and with the decision of the Seventh Circuit itself in *Commissioner vs. Winchester Repeating Arms Co.*, decided March 8, 1943, and not yet officially reported, but found in C. C. H. Federal Tax Service for 1943, Volume 4, page 9486; and lastly if the decision of the Court below is not directly violative of the rule enunciated by you in *Hassett vs. Welsh, et al*, 303 U. S. 303, at pages 303 and 314, and kindred decisions, that if a statute is free from doubt, the Court is without right to consider the purpose of Congress, and that if doubt exists as to the construction of a tax statute, the doubt should be resolved in favor of the taxpayer.

It is petitioner's contention that the decision of the Court below in the instant case is in direct conflict with the above referred to decisions of the Second, Fourth, and Seventh Circuits, and with the decision of this Court.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The sum and substance of the opinion of the Court below is simply that the distribution in liquidation made by petitioner to its stockholders of everything that it owned at the time; i. e., the stock of the new corporations, was not the distribution in liquidation contemplated by Sec. 27 (f) of the 1936 Act; that such stock so distributed could

not be broken down, in the recipients' hands, to show what part represented capital and what part was properly chargeable to the earnings or profit accumulated after February 28, 1913; and that while it is true that a corporation liquidating as did petitioner, distributes the only property it owns at that stage of the proceedings; namely, the stock of the successor corporations, the business enterprise continues pursuant to the plan, and the stockholder continues to be a stockholder, merely exchanging his stock in one corporation for that of another, and, says the Court, as it is the Court's opinion that petitioner is not within the purview of Sec. 27 (f), it deems it unnecessary to consider whether Sec. 115 (h) limits the effect of Sec. 27 (f), as the Commissioner contends.

However, in its decision in the *Winchester Repeating Arms Co.*, cases, *supra*, rendered March 8, 1943, this same Court below gives very careful consideration to such question and to the inference drawn by the Commissioner that had the *Credit Alliance* case involved the application of Section 115 (h), as amended by the 1938 Act, your decision in that case would have been otherwise, and that you would have held Section 115 (h) relevant, and that you "Would have been convinced that Section 27 (f) did not warrant the credit."

And, says the Seventh Circuit,—“We find no basis in the opinion of the Court for this assumption. As pointed out there we are not at liberty to disregard the direct and unambiguous language of subsection (f).”

Now,—while petitioner was liquidated and reorganized under the provisions of Section 112 (b), (4) and (3), of

the 1936 Revenue Act; while in *Commissioner vs. Kay Mfg. Corp.*, 122 Fed. (2d), 443; *Helvering vs. Credit Alliance Corporation*, 123 Fed. (2d), 361, 316 U. S. 107; and *Commissioner vs. Winchester Repeating Arms Co.*, C. C. H. Tax Service for 1943, Vol. 4, p. 9486, the liquidations were under the provisions of Section 112, (b) (6), of the 1936 Revenue Law, we submit that the decision of the Court below in the instant case is in direct conflict with the decisions in each of the above recited cases, in that in all of them the Court stresses the fact that the language of Section 27 (f) of the Act is direct and unambiguous, while the Court below in concluding that the distribution in liquidation made by petitioner was not the distribution in liquidation contemplated by Section 27 (f), and in resting its opinion and judgment on such construction, has undertaken to construe and interpret a provision of the law which under such decisions of the Second and Fourth Circuits, and of this Court is so clear and unambiguous as to preclude any interpretation other than the obvious meaning of the simple and unambiguous language used.

We further submit that the decision below is in direct conflict with the ruling declared by you in *Hassett vs. Welsh et al*, and kindred cases, (303 U. S. 303, at pages 303 and 314) that if a statute is free from doubt, the Court is without right to consider the purpose of Congress, and if doubt exists as to the construction of a taxing statute, that doubt should be resolved in favor of the taxpayer.

Petitioner says further that the decision of the Court below presents an important question of Federal Law, and even if such decision were not in express conflict with

the Second and Fourth Circuits, and with the Seventh Circuit itself, and with this Court, such question should be settled by this Court in any event because of its importance, not simply to petitioner, but to probably many other taxpayers, the number of which is necessarily unknown to your petitioner.

Petitioner further shows that insofar as known to petitioner, the only case other than the instant case involving Section 27 (f), and a liquidation and reorganization under Section 112 (b), (4) and (3), to be decided by a Federal Court of Appeals, is *Reed Drug Company vs. Commissioner*, a decision of the Sixth Circuit, reported in 130 Fed. (2d) 288. The decision in that case seems to rest, in part, upon the Court's belief that Section 27 (h) completely denies the benefit of Section 27 (f) to the taxpayer, if the money or property or securities is not taxable to the distributee, for, says the Court at page 289 of the decision, "It is clear that the Congress intended that Section 27 (h) should take away the credit given under Section 27 (f) in the case of a non-taxable corporate reorganization."

The Sixth Circuit Court further points to Section 115 (h) with the intimation that such subsection likewise modifies or controls Section 27 (f), and then the Court says that, "In construing tax statutes, we must remember that each act carries its own definitions and that the intent of the Congress is the controlling factor. This intent is to be ascertained by considering the entire context of the act, its general purpose, the circumstances surrounding its enactment, and other appropriate tests for ascertaining the will of the Legislators."

That Section 27 (h) controls Section 27 (f) is of course in direct conflict with both the Second and Fourth Circuits in the *Kay Mfg. Co.*, and *Credit Alliance* cases, *supra*, and with your decision in the latter, and too, the Sixth Circuit's finding that Section 115 (h) modifies and controls Section 27 (f) is in flat conflict with the decision of the Seventh Circuit in the *Winchester Repeating Arms* case, *supra*.

Therefore the issue in the instant case would seem to be definitely one for the final determination of this Court.

Wherefore, for the reasons herein shown, and as amplified in the annexed brief, petitioner prays that in the exercise of its discretion, this Court may issue its Writ of Certiorari, to review the decision herein of the Circuit Court of Appeals, and for such other orders as may be appropriate.

Respectfully submitted,

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